No. 84-1841

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

METHODIST HOSPITAL OF BROOKLYN, ACCIDENT PREVENTION & SAFETY LEAGUE, INC., and NAGEL, INC.,

Appellants,

– against –

THE STATE INSURANCE FUND, MARTIN A. FISCHER, EASTMAN BIRKETT, LOUISE COSTE, CHARLES C. MOERDLER, ALBERT C. TODARO, RIVKA CHATMAN, BART DI MATTINA, JAMES H. SCHOLTZ and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund; JUSTIN SCHULMAN, as Supervising Actuary of the State Insurance Fund; EDWARD V. REGAN, as Comptroller of the State of New York; the Commissioner of Taxation and Finance of the State of New York; and the STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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The impairment of the contractual obligation* in this case is the harm caused to the security interest of the appellants. This security interest protected the appellants against possible future

* Reduction of the State Insurance Fund's security constituted a breach of the appellants' contracts of insurance. *See* Jurisdictional Statement pp. 15-16.

liabilities. The appellees, in their Motion to Dismiss or Affirm, claim that Chapter 55, Section 92.2 of the Laws of New York of 1982 ("Chapter 55") has no effect on the appellants' security. The appellees, however, fail to recognize the very real possibility that the appellants will be liable for damages that the State Insurance Fund will be unable to pay because of the diversion of its assets pursuant to Chapter 55. The appellants submit this brief to focus the court's attention on that possibility.

A. *Reduction Of The Fund's Surplus Is A Reduction Of The Fund's Security*

The appellees assert that a distinction exists between the State Insurance Fund's "reserves" and its "surplus" – implying that "surplus" funds are not funds necessary to pay future claims by workers. The "surplus" is not money unnecessary for insurance purposes – the State Insurance Fund is not authorized under the Workers' Compensation Law to hold funds unnecessary for insurance needs. The Fund is required to hold "reasonable" surplus, N.Y. Workers' Compensation Law § 89 (1984-85),* against the possibility that reserves will prove inadequate, either because claims are greater than expected, or because investment returns on reserves are less than anticipated.** The "surplus" funds are thus clearly a part of the State Insurance Fund's security.

B. *Reduction Of The Fund's Security Exposes The Appellants To Liability Under Pre-1982 Policies*

The appellees argue that nothing shows that claims will be made in the future that will bankrupt the State Insurance Fund

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* This would be a different case if the State had, by legislative hearing or otherwise, determined that the State Insurance Fund was retaining a "surplus" in excess of its insurance needs. But this is not what happened. The State simply seized money it found convenient for the routine processes of government.

** The appellees' rationalization, Motion to Dismiss or Affirm p. 9, that State Insurance Fund *reserves* have increased is unfathomable, for so too have the probable liabilities against which those reserves are held. Were it a private insurer, the Fund would not be permitted to undertake new liabilities with so little surplus to protect it.

and retroactively affect the appellants' liability under policies entered into prior to the enactment and institution of Chapter 55. Motion to Dismiss or Affirm pp. 10-11. This argument presumes, however, that all claims covered by pre-1982 policies have already been made and paid. Motion to Dismiss or Affirm p. 13. The appellees are unable to answer the appellants' demonstration of exposure to third party claims on pre-1982 insurance policies. *See* Jurisdictional Statement pp. 11-12.

Each of the appellants purchased insurance from the State Insurance Fund for many years. The insurance covers employee injury claims, including claims based on occupational diseases. Each year's policy covers claims where the injury or exposure happened during the period of the policy, no matter when the injury manifests itself or the claim is asserted. The appellants must look to their 1981 policy, for example, if they are sued in the future for injuries resulting from 1981 events.

The possibility of future suits stemming from past events cannot be dismissed. Across the entire breadth of American law, there is no more dynamic area than toxic torts law. As an entire industry has already discovered, enormous future liabilities are realistically possible for past occupational exposures. This, coupled with the fact that the State Insurance Fund insures against liability "over" to third parties — a liability which is exceptionally broad in New York and from which insureds are not immune — means that these future liabilities will not be limited to the estimated amounts set forth in actuarial schedules.* So long as the appellants have potential obligations which the State Insurance Fund secures, they are harmed when $190 million of the premiums they paid, with expectation that these funds would be among the funds available to pay claims, are taken for general State purposes having nothing to do with insurance.

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* The appellees argue that the appellants have disregarded the absolute immunity provided by § 53 of the N.Y. Workers' Compensation Law from *direct* claims. Motion to Dismiss or Affirm p. 11 (emphasis added). The appellees, as well as the Court of Appeals, completely ignore the fact that § 53 provides *no* immunity for indirect claims, nor can it, as these may arise under other states' laws. *See* Jurisdictional Statement p. 11.

The appellees suggest that there is no evidence that the State Insurance Fund will fail to meet future obligations to defend insureds and pay claims. Motion to Dismiss or Affirm p. 11. The appellees' argument reduces to the assertion that loss of security alone cannot constitute the kind of harm necessary under the Contracts Clause. This argument is plainly wrong. *See* Jurisdictional Statement pp. 15-16. $190,000,000 has been taken from the pool of money available for defense and payment of claims; obviously that loss affects the Fund's ability, at least in the first instance, to make payments should its reserves prove insufficient.* There is no requirement that the appellants await the Fund's insolvency before pursuing their rights.

C. *Any State Obligation For Fund Liabilities Is Not Equivalent To The Security Lost*

Most interestingly, the appellees claim that it is of "critical significance" that the State is "obliged" to cover the State Insurance Fund's unpaid liabilities. Motion to Dismiss or Affirm p. 12. According to this theory, the appellants have suffered no harm to their security interest because the State will treat State Insurance Fund obligations as its own.

The appellants, however, bargained on the credit of the State Insurance Fund and not the credit of the State. They were entitled to prefer the security of a separate fund. In fact, their preference is not unusual. For example, the market frequently regards revenue bonds as less risky than the general obligations of the State, and for years New York Port Authority Bonds traded at lower interest rates than New York State obligations. The wisdom of the appellants' preference is demonstrated by the fact

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* Although the State made a "dry" appropriation of the $190,000,000 (to be available only in the event of insolvency) which the State Insurance Fund, under compulsion of state law, carries on its books as though it were real money, the Court of Appeals ruled that the State had no duty to continue such appropriations. Thus the constitutional issue must be resolved on the assumption that a future legislature will decline to continue these appropriations.

that the State Insurance Fund was solvent at a time when New York State almost declared insolvency.

In any event, the State's ultimate obligation is uncertain at best. No statute explicitly imposes an obligation on the State for Fund liabilities. Of the decisional law adverted to by the appellees, *Skakandy v. State*, 274 App. Div. 153 (3d Dep't 1949), *aff'd*, 298 N.Y. 886 (1950) is irrelevant and *Cardinal v. State*, 304 N.Y. 400 (1953), holds, without discussion of this point, that Fund obligations may be sued on in the Court of Claims. The opinion notes, however, that "The *Fund* is liable to pay the settlement amount," 304 N.Y. at 412 (emphasis added), and says nothing about whether the State has a defense or pays the judgment if the Fund is without money to pay a claim.

In truth, the Court of Appeals dictum in the instant case is the first and only suggestion that the State, under New York law, would be obliged to pay claims on an insolvent State Insurance Fund. And, it is important to note that the Court of Appeals did not, in its opinion, call the obligation of the State a *contractual* obligation. Nor do the appellees, who include the highest legal officer of the State, describe the Fund's liabilities as *contractual* obligations of the State.* This point was raised in the Jurisdictional Statement. Jurisdictional Statement pp. 16-17. Thus, the "critically significant" role of the State is an unreliable support.

D. *The State's Right To Amend The Workers' Compensation Laws Does Not Extend To The Seizure Of Fund Security*

None of the above three ways of defining away the harm Chapter 55 does to the appellants' security interest works. A

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* Of course, for the appellees to concede the *contractual* character of the state's obligation to State Insurance Fund policyholders is to admit what the rest of their papers seek to deny: that State contracts need not be grounded on explicitly contractual legislative language. Thus, the Contracts Clause Claim based on the trust character of State Insurance Fund monies, both as declared by state financial reporting laws, and implicit in the legislative scheme, cannot be dismissed, as the appellees seek to do, by contrasting the explicitly contractual character of the promise in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

fourth approach of the appellees admits the harm, or at least does not deny it, but claims that the State is within its rights because the insurance policy itself makes reference to the potential amendment of the Workers' Compensation law, and reads such amendments back into the contract.

The purpose of the State's reservation of rights is not to authorize restructuring of the basic insurance relationship. It is, rather, to assure continuity and uniformity of policy coverages and procedures. Moreover, as a constitutional matter, such a reservation does not permit violation of the reasonable expectation of the contract, as this Court has held in *Lynch v. United States*, 292 U.S. 571 (1934). The statutory scheme as enacted and administered — in effect a mutual insurance program with dividends and separate accounts — may not fairly be held contingent on *legislative* determination that State Insurance Fund money is better spent elsewhere rather than held for the insurance uses for which it was collected.

The appellees assert that the State's action in seeking the assistance of the State Insurance Fund during the New York State fiscal crisis in the 1970s put policyholders on notice that the State might seize assets of the State Insurance Fund later. The legislation referred to by the appellees was enacted at a time of high state emergency, and required the State Insurance Fund to invest in Municipal Assistance obligations that the Fund might ordinarily have found too risky for investing fiduciary funds in.

The appellees' argument demonstrates the danger in abandoning one of the most provident anchors of our constitutional scheme — the dependability of government engagements. Here, the State claims that a group of citizens who did not press their rights (if rights indeed they had, given the state of fiscal emergency besetting New York) can no longer have any rights — that their failure to assert their private interest against the State, whether because they were concerned for the common good or because litigation is fiercely expensive, means that their expectations can no longer be strongly held. This line of argument, if permitted, makes impossible judicial supervision of the accommodation of the interests the Contracts Clause protects and changing public need.

The heart of the decision in *United States Trust Co. v. New Jersey*, *supra*, is the holding that claims made by the State that *State* engagements must be rearranged demand close judicial scrutiny. Inasmuch as this case involves an important issue of state fidelity to promises, fairly made and relied on, and falls squarely within the Court's mandatory jurisdiction, it should receive a plenary hearing.

Respectfully submitted,

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